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May 21, 2004

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 - 12th Street, SW  
Washington, DC 20554

Re: Petition for Reconsideration  
East Liverpool, Ohio and Moon Township, Pennsylvania  
Keymarket Licenses, LLC

Dear Ms Dortch:

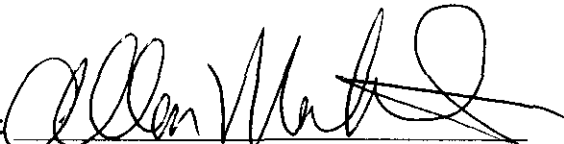
On behalf of Keymarket Licenses, LLC, licensee of Radio Station WOGF(FM), East Liverpool, Ohio, we are herewith filing an original and four (4) copies of its Petition for Reconsideration of the Commission's return of the above-referenced Petition for Rulemaking to reallocate Channel 282B from East Liverpool, Ohio to Moon Township, Pennsylvania and modify the license of Radio Station WOGF(FM) accordingly.

Should any questions arise with respect to this matter, please contact the undersigned counsel.

Respectfully submitted,

KAYE SCHOLER LLP

By:



Allan G. Moskowitz

AGM/lis

Enclosure

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BEFORE THE

# Federal Communications Commission

WASHINGTON, D C 20554

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MAY 21 2004

In The Matter of )  
 )  
Amendment of Section 73.202(b) )  
of the Commission's Rules )  
FM Table of Allotments )  
 )  
(East Liverpool, Ohio and )  
Moon Township, Pennsylvania) )  
 )  
TO: Chief, Media Bureau )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MM Docket No. \_\_\_\_\_  
RM- \_\_\_\_\_

## PETITION FOR RECONSIDERATION

Keymarket Licenses, LLC ("Keymarket"), by its counsel and pursuant to Section 1.106 of the Commission's Rules, respectfully requests that the Chief, Media Bureau, reconsider the April 22, 2004 action of the Assistant Chief, Audio Division, which, by letter, returned Keymarket's "Petition for Rulemaking" to reallocate Channel 282B from East Liverpool, Ohio to Moon Township, Pennsylvania and modify the license of Radio Station WOGF(FM) accordingly. In support thereof the following is respectfully shown:

### Background

1. On August 20, 2003, Keymarket filed its "Petition for Rulemaking" ("Petition") to reallocate Channel 282B from East Liverpool, Ohio to Moon Township, Pennsylvania, as that community's first local service and modify the license of Radio Station WOGF(FM) accordingly. Attached hereto is the Statement of William J. Getz of Carl T. Jones Corporation, Engineering

Consultant to Keymarket. As indicated in the Petition and Mr. Getz' statement, the proposed reallocation of WOGF(FM) will extend new 60 dBu service to an additional 19,546 persons and would improve two long-standing pre-1964 grandfathered first-adjacent channel short spacings; the first, to Radio Station WQAL operating on Channel 281B, would be improved by 5.88 kilometers and the second, to Radio Station WQKT operating on Channel 283B, would be improved by 2.66 kilometers. In Footnote 1 to the Petition's Engineering Statement, the licensee noted that:

Both WOGF(FM)'s licensed site and the Moon Township allotment reference site are also short-spaced to second adjacent channel, pre-1964, short-spaced station WJJJ(FM), Pittsburgh, Pennsylvania (Channel 284B). Pursuant to Section 73.213(a)(4) of the FCC Rules, there are no distance separation or interference protection requirements with respect to second adjacent Channel short-spacings that have existed continuously since November 16, 1964.

2. Despite the fact that Keymarket's Petition proposed a first-service to Moon Township, a community of over 22,200, and the improvement of two existing grandfathered first adjacent channel short-spacings, on April 22, 2004, eight (8) months after filing, the Assistant Chief, Audio Division, returned Keymarket's Petition because the staff's engineering analysis showed "that the reallocation of Channel 282B at the proposed site would increase WOGF(FM)'s short-spacing to WPGB(FM)<sup>1</sup> Channel 284B at Pittsburgh, Pennsylvania by approximately 2.8 kilometers.

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<sup>1</sup> WJJJ(FM) changed its call sign to WPGB(FM) on January 2, 2004.

Section 73.207 of the Commission's Rules requires that the Petition to Amend the Table of Allotments meet all of the minimum distance separation requirements of that Section."

3. However, the staff's return of Keymarket's Petition violates the Commission's clearly annunciated policy in Grandfathered Short-Spaced FM's Stations Report and Order, 12 FCC Rcd. 11840 (1997). Grandfathered Short-Spaced FM Stations, supra specifically restored the previous Section 73.213 rule used between 1964 and 1987 which permitted second and third adjacent channel grandfathered stations to implement maximum class facilities and/or change transmitter site with complete flexibility on second-adjacent channel and third-adjacent channel short-spacings. As indicated in the Report and Order, "the number of grandfathered stations able to move with respect to a second and third adjacent channel station is extremely limited."<sup>2</sup> The Commission therein recognized a minimal risk of interference between second and third-adjacent channel grandfathered stations but noted that it was in the immediate area of the transmitter and actually constituted a substitution of service. Consequently, the Commission concluded that ". . . reinstatement of the pre-1987 Rules regarding second and third adjacent channel grandfathered stations would best serve the public interest . . . The small risk of interference is far outweighed by the improvement in flexibility and improved service . . . We have no

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<sup>2</sup> Report and Order at 11848.

intention of relaxing second-adjacent channel and third adjacent channel spacing requirements as allotment and assignment criteria for any group except pre-1964 grandfathered stations." (emphasis supplied) Id. at 11849.

4. Consequently, in Grandfathered Short-Spaced FM Stations, supra the Commission revised its *application and allotment* policy for grandfathered short-spaced stations to eliminate all spacing requirements to second-adjacent and third-adjacent channel stations.

5. Furthermore, when a pre-1964 grandfathered short-spaced station proposes a change in the Table of Allotments the Commission must apply its current spacing rules in deciding whether such changes are permissible. In East Los Angeles, Long Beach and Frazier Park, California, 10 FCC Rcd. 2864 (Allocations BR. 1995), the Branch analyzed the second-adjacent channel spacing rule in effect at the time of its review of a short-spaced allotment proposal despite the fact that the Commission had changed the rules since the filing of the Petition for Rulemaking.

6. Therefore, the principal established in East Los Angeles, supra, that the Commission must look to the current spacing rules for pre-1964 grandfathered short-spaced stations, would dictate that Keymarket's proposed increase of WOGF(FM)'s short-spacing to WPGF(FM) is irrelevant because the current rule, Section 73.213(a)(4), specifically states there are no distance separation requirements with respect to second-adjacent and

third-adjacent channel by short-spacings which have existed since November 16, 1984.

7. Therefore, the Audio Division's letter stating that the "Commission's policy is to grant no waivers of a spacing requirement in considering the allotment of a FM channel" is inapplicable. The Keymarket Petition does not request a waiver of any FCC Rule and may be granted in compliance with all applicable FCC Rules in that, pursuant to Section 73.213(a)(4), there are no distance separation requirements between WOGF(FM) and WPGB(FM). Consequently, the Keymarket Petition cannot exacerbate a minimum distance spacing requirement which does not exist.

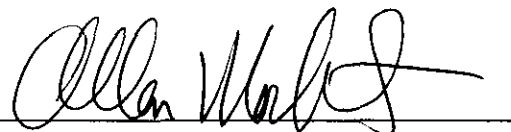
8. As indicated, the Commission established that the actual number of second- and third-adjacent channel grandfathered stations is exceedingly small, certainly less than the 300 estimated by NAB. Grandfathered Short-Spaced FM Stations at 11848. Moreover, the Commission also concluded that in these circumstances even the actual potential for interference is "minimal", is in the immediate area of the transmitter and is actually a substitution of service. Id. at 11849. In other words, in the real world the interference resulting from such a short-spacing would only arise in very few situations and would be virtually non-existent which is why the Commission eliminated the separation requirement.

9. The Bureau erroneously returned Keymarket's Petition. Grandfathered Short-Spaced FM Stations Report and Order, supra,

clearly and specifically eliminated the requirement that grandfathered short-spaced stations protect second-adjacent and third-adjacent channel allotments at both the application and the allotment stage. Furthermore, Section 73.213(a)(4) clearly states that for pre-1964 grandfathered short-spaced stations there are no distance separation or interference protection requirements with respect to second-adjacent and third-adjacent channel short spacings. Therefore, WOGF(FM)'s short-spacing to second-adjacent channel WPGF(FM) is, pursuant to the rules, irrelevant and pursuant to the Commission's Grandfathered Short-Spaced FM Stations Report and Order clearly not a factor at the allotment stage. Since the proposal complies with all other applicable interference requirements and otherwise furthers the public interest, the Chief Media Division must reconsider and reverse the action of the Assistant Chief, Audio Division returning the instant Petition for Rulemaking.

WHEREFORE, for the foregoing reasons, Keymarket Licenses, LLC respectfully urges the Chief, Media Bureau, to reconsider the April 22, 2004 action taken by the Audio Division and accept the above-referenced Petition for Rulemaking.

Respectfully submitted,

By: 

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Kaye Scholer LLP  
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Washington, DC 20005  
(202) 682-3500

Attorney for Keymarket  
Licenses, LLC

Dated: May 21, 2004



**STATEMENT OF WILLIAM J. GETZ  
IN SUPPORT OF A  
PETITION FOR RECONSIDERATION**

I am a Radio Engineer, an employee in the firm of Carl T. Jones Corporation with offices located in Springfield, Virginia. My education and experience are a matter of record with the Federal Communications Commission.

This office has been authorized by Keymarket Licenses, LLC ("Keymarket"), licensee of WOGF(FM), East Liverpool, Ohio, to prepare this statement in support of an Petition for Reconsideration. Keymarket filed a Petition to Amend the FM Table of Allotments ("Keymarket Petition") which requested the reallocation of Channel 282B from East Liverpool, Ohio, to Moon Township, Pennsylvania, and the modification of the license of Radio Station WOGF(FM) accordingly. By letter dated April 22, 2004 ("Audio Division Letter"), the Audio Division returned the Keymarket Petition to Amend the FM Table of Allotments as unacceptable for filing.

Background

The Keymarket Petition would allow WOGF(FM) to provide a first local service to Moon Township, Pennsylvania (2000 population 22,290). Moreover, the proposed reallocation of WOGF(FM) will extend new 60 dBu service to an additional 19,546 persons

STATEMENT OF WILLIAM J. GETZ  
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and would improve two longstanding pre-1964 grandfathered first-adjacent channel short-spacings <sup>1</sup>

According to the Audio Division's Letter, paragraph 2, the Keymarket Petition was returned as unacceptable for filing because:

"the reallocation of Channel 282B at the proposed site would increase WOGF(FM)'s short-spacing to WPGB(FM), Channel 284B, at Pittsburgh, Pennsylvania by approximately 2.8 kilometers. Section 73.207 of the Commission's Rules requires that petitions to amend the Table of Allotments meet all of the minimum distance spacing requirements of that section "

WOGF and WPGB are second-adjacent channel stations; their short-spacing has existed continuously since November 16, 1964. Pursuant to 47 C.F.R. §73.213(a)(4), "there are no minimum distance separation requirements with respect to second-adjacent and third-adjacent channel short-spacings that have existed continuously since November 16, 1964". Nonetheless, the Audio Division returned the Keymarket Petition because the proposed WOGF allotment reference site fails to satisfy the minimum distance spacing requirements of Section 73.207 with respect to WPGB.

The Audio Division's imposition of a minimum distance spacing requirement with respect to WOGF and WPGB is clearly misplaced and contrary to Section 73.213(a)(4) of the FCC Rules. Moreover, as shown below, the Audio Division's action is equally inapposite with the Commission's mandate regarding the rules that govern pre-1964,

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<sup>1</sup> The WOGF(282B)/WQAL(281B) short-spacing would be improved by 5.88 kilometers and the WOGF(282B)/WQKT(283B) short-spacing would be improved by 2.66 kilometers

grandfathered short-spaced, second-adjacent channel and third-adjacent channel stations.

Further, contrary to the Audio Division's statement excerpted above, pre-1964 grandfathered, short-spaced stations that do not "meet all the minimum distance spacing requirements of Section 73.207" are commonly permitted to change community of license via a Petition to amend the FM Table of Allotments.

Second-Adjacent Channel, Pre-1964, Grandfathered Short-Spaced Stations

Unambiguously, Section 73.213(a)(4) of the FCC Rules, states "there are no distance separation or interference protection requirements with respect to second-adjacent and third-adjacent channel short-spacings that have existed continuously since November 16, 1964" The Audio Division returned the Keymarket Petition because it did not meet a minimum distance separation which was clearly *not applicable* to Keymarket's Petition because there are no Section 73.207 distance separation requirements which apply to the WOGF(FM)/WPGB(FM) pre-1964, second-adjacent channel relationship.

Similarly clear is the Commission's stated allotment and assignment policy regarding second-adjacent channel, pre-1964, grandfathered short-spaced stations at the application stage and at the allotment stage In 1997 the Commission adopted new and revised allotment (i.e. allotment stage) and assignment (i.e. application stage) rules for second-adjacent channel and third-adjacent channel pre-1964 grandfathered short-spaced stations.

In Paragraph 29 of the Report and Order adopting these changes, the Commission specifically stated that it had “no intention of relaxing second-adjacent-channel and third-adjacent-channel spacing requirements as *allotment and assignment criteria* for any group *except* pre-1964 grandfathered short-spaced stations” (emphasis added).<sup>2</sup> Accordingly, for the small group of second and third adjacent channel, pre-1964, grandfathered short-spaced stations (i.e. the “exception” specifically discussed by the Commission) the allotment and assignment protection criteria were eliminated by the Commission in *Grandfathered Short-Spaced FM Stations*. In direct contravention of Section 73.213(a)(4) of the FCC Rules, and clearly contrary to the Commission’s mandate in *Grandfathered Short-Spaced FM Stations*, the Audio Division Letter returned the Keymarket Petition based on a minimum distance separation requirement which has been eliminated.

#### Reallocation of Grandfathered Short-Spaced Stations

Contrary to the Audio Division Letter’s assertions, pre-1964 grandfathered, short-spaced stations that do not “meet all the minimum distance spacing requirements of Section 73.207” are commonly permitted to change community of license via a Petition to amend the FM Table of Allotments. The Keymarket Petition requested that WOGF(FM) be afforded the same opportunity to change its community of license as other stations

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<sup>2</sup> See Report and Order, MM Docket 96-120, *Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd at 11849, Paragraph 29. (“*Grandfathered Short-Spaced FM Stations*”).

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authorized in conformity of FCC Rules which became short-spaced as a result of a Commission Rule change<sup>3</sup>

Because the WOGF(FM) proposed allocation reference site improves the short-spacings to both first-adjacent channel grandfathered short-spaced stations, reduces the interference potential between the stations and requests no change in Class, the proposed change in the WOGF(FM) community of license follows the precedent established in the proceedings cited in footnote 3.

Paragraph 3 of the Audio Division Letter states:

"Traditionally, the Commission's policy is to grant no waivers of the spacing requirements in considering the allotment of an FM Channel. Although the Commission has created a limited exception to the rule, allowing us to waive the rule for petitions that would decrease [*sic*] an existing short-spacing, we cannot consider a proposal that would exacerbate an existing short-spacing."

The Keymarket Petition does not request a waiver of any FCC Rule. The Keymarket Petition may be granted in compliance with all applicable FCC Rules. Contrary to the Audio Division Letter, the Keymarket proposal cannot exacerbate an existing short-spacing to WPGB(FM). This is because, pursuant to Section 73.213(a)(4) of the FCC Rules, there is

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<sup>3</sup> See Newman and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992), Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Oceanside and Encinitas, CA), MM Docket No. 99-170, DA 99-1837, Released September 10, 1999, and Berlin and North Conway, New Hampshire, MM Docket No. 97-216, DA 99-1839, Released September 10, 1999.

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no distance separation requirement between WOGF(FM) and WPGB(FM). Therefore, the Keymarket Petition cannot exacerbate (nor can it improve upon) a minimum distance spacing requirement which does not exist.

This statement and the supporting exhibit were prepared by me or under my direct supervision and are believed to be true and correct.

DATED: May 11, 2004

  
William J. Getz